

AMENDED IN SENATE MAY 5, 2009
AMENDED IN SENATE APRIL 15, 2009

SENATE BILL

No. 239

Introduced by Senator Pavley
(Coauthor: Senator Hancock)

February 24, 2009

An act to repeal and add Section 532f of the Penal Code, relating to crimes.

LEGISLATIVE COUNSEL'S DIGEST

SB 239, as amended, Pavley. Mortgage fraud.

Existing law provides that a person, other than the loan applicant, who makes false financial statements in connection with an application for a loan to be secured by real property is guilty of a misdemeanor, punishable by a fine not exceeding \$10,000, by imprisonment in a county jail not exceeding one year, or by both the fine and imprisonment; and by restitution to the victim, as specified.

This bill would delete this provision and provide instead for the offense of mortgage fraud, as defined, a violation of which would be a ~~felony~~ *public offense* punishable by imprisonment in the state prison ~~for 16 months, or 2 or 3 years~~, or in a county jail for not more than one year. *The bill would provide that mortgage fraud may only be prosecuted when the value of the alleged fraud meets the threshold for grand theft, as specified.* The bill would set forth legislative findings, declarations, and intent with respect to its enactment. By revising existing crimes and creating new crimes, this bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: yes.

The people of the State of California do enact as follows:

1 SECTION 1. (a) The Legislature finds and declares the
2 following:

3 (1) California is one of the leading states in the incidence of
4 mortgage fraud.

5 (2) Mortgage fraud has a profoundly harmful impact on the
6 citizens of this state and its economy.

7 (3) The harms associated with mortgage fraud include
8 foreclosures that disproportionately affect low-income borrowers,
9 the deterioration of neighborhoods stricken by foreclosures and
10 plummeting property values, the proliferation of fraudulent loan
11 modification scams aimed at defrauding desperate borrowers, the
12 paralysis of the free flow of credit in the lending market, and chaos
13 in the economy characterized by massive increases in
14 unemployment, bankruptcies, and investor capital losses.

15 (4) While perpetrators of mortgage fraud are currently subject
16 to prosecution under general felony theft statutes, the only
17 California statute specifically dedicated to mortgage fraud treats
18 the crime as a misdemeanor.

19 (5) Time is of the essence in the investigative stage of real estate
20 fraud-related cases, which are dependent on the timely acquisition
21 of documents held by parties to real estate transactions such as
22 mortgage brokers, title and escrow companies, and lenders. The
23 current statutory scheme hampers the ability of law enforcement
24 to efficiently gather those documents and determine whether crimes
25 have occurred.

26 (b) It is the intent of the Legislature in enacting this measure to
27 do all of the following:

28 (1) Encourage and facilitate a shift of prosecution of mortgage
29 fraud cases that otherwise would be prosecuted under misdemeanor
30 and general felony theft statutes to prosecution under one

1 specifically dedicated felony mortgage fraud statute that carries
2 the same penalties as the currently utilized general felony theft
3 statutes.

4 (2) Facilitate the tracking of mortgage fraud cases, which will
5 assist law enforcement in accessing federal funds for the purpose
6 of combating mortgage fraud to the extent they are available.

7 (3) Eliminate confusion about the elements of the crime of
8 mortgage fraud and the penalties for that crime and help to ensure
9 that acts that should be prosecuted as felonies are not
10 inappropriately prosecuted as misdemeanors.

11 (4) Provide an efficient method to obtain necessary documents
12 from real estate recordholders in fraud-related cases.

13 SEC. 2. Section 532f of the Penal Code is repealed.

14 SEC. 3. Section 532f is added to the Penal Code, to read:

15 532f. (a) A person commits mortgage fraud if, with the intent
16 to defraud, the person does any of the following:

17 (1) ~~Knowingly makes any deliberate~~ *Deliberately makes any*
18 misstatement, misrepresentation, or omission during the mortgage
19 lending process with the intention that it be relied on by a mortgage
20 lender, borrower, or any other party to the mortgage lending
21 process.

22 (2) ~~Knowingly~~ *Deliberately* uses or facilitates the use of any
23 ~~deliberate~~ misstatement, misrepresentation, or omission, knowing
24 the same to contain a misstatement, misrepresentation, or omission,
25 during the mortgage lending process with the intention that it be
26 relied on by a mortgage lender, borrower, or any other party to the
27 mortgage lending process.

28 (3) Receives any proceeds or any other funds in connection with
29 a mortgage loan closing that the person knew resulted from a
30 violation of paragraph (1) or (2) of this subdivision.

31 (4) Files or causes to be filed with the recorder of any county
32 in connection with a mortgage loan transaction any document the
33 person knows to contain a deliberate misstatement,
34 misrepresentation, or omission.

35 (b) An offense involving mortgage fraud shall not be based
36 solely on information lawfully disclosed pursuant to federal
37 disclosure laws, regulations, or interpretations related to the
38 mortgage lending process.

39 (c) (1) Notwithstanding any other provision of law, an order
40 for the production of any or all relevant records possessed by a

1 real estate recordholder in whatever form and however stored may
2 be issued by a judge upon a written ex parte application made
3 under penalty of perjury by a peace officer stating that there are
4 reasonable grounds to believe that the records sought are relevant
5 and material to an ongoing investigation of a felony fraud violation.

6 (2) The ex parte application shall specify with particularity the
7 records to be produced, which shall relate to a party or parties in
8 the criminal investigation.

9 (3) Relevant records may include, but are not limited to,
10 purchase contracts, loan applications, settlement statements, closing
11 statements, escrow instructions, payoff demands, disbursement
12 reports, or checks.

13 (4) The ex parte application and any subsequent judicial order
14 may be ordered sealed by the court upon a sufficient showing that
15 it is necessary for the effective continuation of the investigation.

16 (5) The records ordered to be produced shall be provided to the
17 peace officer applicant or his or her designee within a reasonable
18 time period after service of the order upon the real estate
19 recordholder.

20 (d) (1) Nothing in this section shall preclude the real estate
21 recordholder from notifying a customer of the receipt of the order
22 for production of records, unless a court orders the real estate
23 recordholder to withhold notification to the customer upon a
24 finding that this notice would impede the investigation.

25 (2) If a court has made an order to withhold notification to the
26 customer under this subdivision, the peace officer who or law
27 enforcement agency that obtained the records shall notify the
28 customer by delivering a copy of the ex parte order to the customer
29 within 10 days of the termination of the investigation.

30 (e) (1) Nothing in this section shall preclude the real estate
31 recordholder from voluntarily disclosing information or providing
32 records to law enforcement upon request.

33 (2) This section shall not preclude a real estate recordholder, in
34 its discretion, from initiating contact with, and thereafter
35 communicating with and disclosing records to, appropriate state
36 or local agencies concerning a suspected violation of any law.

37 (f) No real estate recordholder, or any officer, employee, or
38 agent of the real estate recordholder, shall be liable to any person
39 for either of the following:

1 (1) Disclosing information in response to an order pursuant to
2 this section.

3 (2) Complying with an order under this section not to disclose
4 to the customer the order, or the dissemination of information
5 pursuant to the order.

6 (g) Any records required to be produced pursuant to this section
7 shall be accompanied by an affidavit of a custodian of records of
8 the real estate recordholder or other qualified witness which states,
9 or includes in substance, all of the following:

10 (1) The affiant is the duly authorized custodian of the records
11 or other qualified witness and has authority to certify the records.

12 (2) The identity of the records.

13 (3) A description of the mode of preparation of the records.

14 (4) The records were prepared by the personnel of the business
15 in the regular course of business at or near the time of an act,
16 condition, or event.

17 (5) Any copies of records described in the order are true copies.

18 (h) A person who violates this section is guilty of a public
19 offense punishable by imprisonment in the state prison or in a
20 county jail for not more than one year.

21 (i) For the purposes of this section, the following terms shall
22 have the following meanings:

23 (1) "Person" means any individual, partnership, firm,
24 association, corporation, limited liability company, or other legal
25 entity.

26 (2) "Mortgage lending process" means the process through
27 which a person seeks or obtains a mortgage loan, including, but
28 not limited to, solicitation, application, origination, negotiation of
29 terms, third-party provider services, underwriting, signing and
30 closing, and funding of the loan.

31 (3) "Mortgage loan" means a loan or agreement to extend credit
32 to a person that is secured by a deed of trust or other document
33 representing a security interest or lien upon any interest in real
34 property, including the renewal or refinancing of the loan.

35 (4) "Real estate recordholder" means any person, licensed or
36 unlicensed, that meets any of the following conditions:

37 (A) Is a title insurer that engages in the "business of title
38 insurance" as defined by Section 12340.3 of the Insurance Code,
39 an underwritten title company, or an escrow company.

1 (B) Functions as a broker or salesperson by engaging in any of
2 the type of acts set forth in Sections 10131, 10131.1, 10131.2,
3 10131.3, 10131.4, and 10131.6 of the Business and Professions
4 Code.

5 (C) Engages in the making or servicing of loans secured by real
6 property.

7 *(j) Fraud involving a mortgage loan may only be prosecuted*
8 *under this section when the value of the alleged fraud meets the*
9 *threshold for grand theft as set out in subdivision (a) of Section*
10 *487.*

11 SEC. 4. No reimbursement is required by this act pursuant to
12 Section 6 of Article XIII B of the California Constitution because
13 the only costs that may be incurred by a local agency or school
14 district will be incurred because this act creates a new crime or
15 infraction, eliminates a crime or infraction, or changes the penalty
16 for a crime or infraction, within the meaning of Section 17556 of
17 the Government Code, or changes the definition of a crime within
18 the meaning of Section 6 of Article XIII B of the California
19 Constitution.